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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-697

ENCYCLOPAEDIA BRITANNICA, INC. and
BRITANNICA HOME LIBRARY SERVICES, INC.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY TO THE BRIEF OF THE FEDERAL TRADE COMMISSION IN OPPOSITION

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I. THE WRIT SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF FIRST AMENDMENT LAW RAISED BY THE FTC'S CONTINUING PROGRAM OF AFFIRMATIVE DISCLOSURE ORDERS DICTATING THE CONTENT OF SPEECH.

The order at issue in this case is but a part of a broad Federal Trade Commission program of affirmative disclosure orders in deceptive advertising cases through which the FTC continues to regulate the content of commercial speech far beyond the minimum necessary to prevent deception. Nowhere in its response does the FTC contest this proposition.

The FTC implicitly concedes, as it must, that "affirmative disclosure requirements form the backbone of current FTC initatives . . ." against misleading advertising.* Indeed, there have been at least 44 such affirmative disclosure orders issued in recent years by the FTC, many of which require the advertiser to speak precise words chosen by the FTC. See Britannica Petition at pp. 16-17.

The FTC also implicitly concedes, as it must, that it has applied *and will continue to apply* its "fencing-in" doctrine in deceptive advertising cases without modification to meet the new requirements of *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).** Misapplication of the "fencing-in" doctrine has been particularly noticeable under the FTC's affirmative disclosure program. Of the six other cases to reach the Court of Appeals in which affirmative disclosures were ordered by the FTC, five have resulted in partial or complete reversals. See Britannica Petition at p. 16.

When this Court held that commercial speech is entitled to First Amendment protection, it was anticipated that one of the most significant consequences would be in the FTC's regulation of deceptive advertising and particularly efforts by the

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* See *Consumer Information Remedies*, published by FTC staff, at p. 276, quoted in Britannica Petition at p. 17.

** The "fencing-in" doctrine, which was developed in antitrust cases, permits the FTC to prohibit not only the conduct found to be unlawful, but reasonably related conduct as well. When applied in the deceptive advertising field, the "fencing-in" doctrine results in orders which go far beyond what is necessary to prevent deception and consequently runs afoul of the commercial free speech doctrine. In its response the FTC affirmatively asserts the power to issue affirmative disclosure orders if the orders are a "reasonable method of eliminating . . . illegal conduct," FTC Brief in Opposition at p. 8, citing an antitrust decision as authority. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). Similarly, the FTC cites antitrust authority for the proposition that it enjoys discretion to decide "whether a 'broad' or 'narrow' order will be most effective. . . ." FTC Brief in Opposition at p. 10.

FTC to impose affirmative disclosure requirements. See Britannica Petition at p. 16. Thus, the Court has repeatedly mentioned in dictum the possibility that affirmative disclosure orders would be constitutional if "necessary to prevent deception." *Friedman* v. *Rogers*, 440 U. S. 1, 10, 16 (1979); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383-384 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U. S. 85, 98 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771-772 (1976). However, this Court has not yet taken a false advertising case or any case actually involving a commercial speech affirmative disclosure requirement; and the Court has never intimated, even in dictum, that any affirmative disclosure requirement could constitutionally go beyond the minimum necessary to prevent deception.

In light of the FTC's broad program of affirmative disclosure orders dictating the content of commercial messages, and in light of the FTC's persistent claim that it may continue, in the face of *Virginia State Board of Pharmacy* and repeated reversals by the courts of appeals, to utilize its broad "fencing-in" doctrine to structure commercial messages in ways not necessary to prevent deception, it is time for this Court to grant certiorari in an affirmative disclosure case and decide whether application of the "fencing-in" doctrine to advertising and other communications can survive the demise of the commercial free speech exception to the First Amendment.

This case presents an ideal vehicle. The order of the FTC below incontestably regulates the content of Britannica's speech and forces its salesmen to speak words of the FTC's choosing which are in no way necessary to prevent deception. Britannica salesmen are required under the order issued by the FTC to exhibit to each customer a Miranda warning-like card, the language on which would lead the consumer—in the words of the dissenting judge below—to conclude that the salesman is

"afflicted with some strange marketplace malady." No other salesmen in this country are required to exhibit such a card to prospective customers, and no one would suggest that the absence of such a card renders the sales presentations of these salesmen necessarily deceptive. This case is thus not only an example of the FTC's overbroad affirmative disclosure program, regulating the content of commercial speech far beyond what is necessary to prevent deception, it is a particularly egregious example of that program.*

II. THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT'S DECISION IN BENEFICIAL CORP. AND THE DECISION BELOW ON THE APPROPRIATE SCOPE OF JUDICIAL REVIEW.

The FTC order in this case, which goes far beyond what is necessary in order to prevent deception, plainly escaped reversal at the hands of the Court of Appeals by reason of the deference which the court paid to the FTC—deference which in a commercial speech case places the Seventh Circuit squarely in conflict with the decision of the Third Circuit in *Beneficial Corp.* v. *FTC,* 542 F. 2d 611 (3rd Cir. 1976), *cert. denied,* 430 U. S. 983 (1977).

The conflict has recurred and been confirmed by a subsequent decision of the Seventh Circuit, *Porter & Dietsch, Inc.*

* The FTC asserts that certiorari should be denied because, prior to issuing its order, the FTC made a factual finding that Britannica salesmen had engaged in deceptive conduct. FTC Brief in Opposition at pp. 9, 13. The argument proves too much. Every affirmative disclosure order issued by the FTC will be based on such a finding. If such a finding were sufficient justification, all affirmative disclosure orders issued by the FTC would escape constitutional review.

The FTC also asserts that door-to-door commercial messages are special, relying on *Ohralik* v. *Ohio State Bar Ass'n.,* 436 U. S. 447 (1978). *Ohralik* involved a time-honored and almost universal rule prohibiting solicitation by an attorney, a profession subject to special regulation. *Ohralik* did not involve a regulation of the *content* of speech in any way.

v. *FTC,* 605 F. 2d 294, 304 (7th Cir. 1979), again adopting and applying in a commercial speech case the old "wide latitude" standard of judicial review which was explicitly rejected by the Third Circuit in *Beneficial Corp.* v. *FTC, supra.*

In *Beneficial Corp.* the Court of Appeals for the Third Circuit adopted two rules. First, it announced as a rule of substantive law that the FTC could not regulate commercial speech after *Virginia State Board of Pharmacy* except as "necessary to prevent deception." Second, it adopted a new, more exacting standard of judicial review to determine whether the FTC had in fact correctly applied the substantive rule of law. In its petition to this Court from the Third Circuit's decision, the FTC sought review *only* of the portion of the Third Circuit's opinion rejecting the old "standard of judicial review of remedies of administrative agencies," and adopting a new more exacting standard. In its opinion in the present case, the Seventh Circuit at least purported to apply the *Beneficial Corp.* rule of substantive law. However, *at the express urging of the FTC,* the Seventh Circuit adopted the old deferential standard of judicial review of remedies of administrative agencies in direct conflict with the rule in *Beneficial Corp.* See Britannica Petition at pp. 21-22.

In its response, the FTC makes two conflicting and flatly erroneous arguments to avoid the clear conflict between the Circuits. First, the FTC claims that *Beneficial Corp.*, in so far as it adopted a more exacting standard of judicial review of administrative agencies in First Amendment cases, has been overruled by three subsequent commercial speech decisions of this Court. *National Society of Professional Engineers* v. *United States,* 435 U. S. 679 (1978); *Ohralik* v. *Ohio State Bar Association,* 436 U. S. 447 (1978); *Friedman* v. *Rogers,* 440 U. S. 1 (1979). See FTC Brief in Opposition at pp. 11-12. The FTC is wrong. Not one of these cases involves the scope of review of a decision by an administrative agency. Not one involves the scope of review of anything. The most those

cases stand for is the uncontested proposition, clearly applicable when *Beneficial Corp.* was decided, that commercial speech receives less constitutional protection than other kinds of speech. It is beyond question that *Beneficial Corp.* has in no way been overruled, and that if an affirmative order of the FTC dictating the content of commercial speech arose today in the Third Circuit, it would receive the same exacting scrutiny applied by the Third Circuit in *Beneficial Corp.*

Second, the FTC argues that the Seventh Circuit opinion below does not conflict with but agrees with *Beneficial Corp.** The argument is disingenuous at best. The Seventh Circuit opinion agrees with *Beneficial Corp.* as to the substantive rule of law to be applied by the FTC. However, *the only part of the opinion below addressing scope of review* explicitly adopts, at the express urging of the FTC, the precise standard of review rejected by the Third Circuit in *Beneficial Corp.* and urged on this Court by the FTC in its petition for certiorari in that case.** See Britannica Petition at p. 22. Moreover, six days after the decision below, another panel of the Seventh Circuit expressly adopted and applied the same deferential standard of judicial review to another FTC order challenged on First Amendment grounds. *Porter & Dietsch, Inc.* v. *FTC*, 605 F. 2d 294, 304 (7th Cir. 1979).***

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* The FTC does not explain why, if *Beneficial Corp.* has been "overruled" by recent Supreme Court cases, the Seventh Circuit would apply the *Beneficial* standard.

** It is also clear that the Seventh Circuit, having stated that it would apply the deferential standard of review granting "wide latitude" to the FTC, proceeded in fact to do so. Thus the court made no effort, independently of the FTC's having concluded that the order was "required," to explain (nor does the FTC explain in its response) how the rigid and detailed specification of Britannica's communications could be "necessary to prevent deception." See Britannica Petition at p. 10.

*** The FTC's claim that the old deferential standard of review is applicable in the Seventh Circuit only to statutory claims, FTC

(Footnote continued on next page.)

The law of the Seventh Circuit thus clearly conflicts with the law in the Third Circuit on the precise and important issue raised by the FTC in a certiorari petition to this Court from the Third Circuit filed before the conflict developed. The conflict is still unresolved. This Court should grant the writ to resolve it.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE FTC ORDER IS IN DIRECT CONFLICT WITH THE FIRST AMENDMENT PRINCIPLES APPLICABLE TO A GOVERNMENTAL RESTRAINT ON THE DISTRIBUTION OF PUBLICATIONS.

As set forth in the Britannica Petition at pp. 24-26, the FTC order against Britannica is in direct conflict with the fundamental First Amendment principles which apply to a governmental restraint on the distribution of publications. In response, the FTC makes no effort to defend the order under traditional First Amendment principles. Instead, the FTC asserts that "the cases and principles relied on by petitioners are inapposite . . . since the Commission has neither limited petitioner's publishing activities nor even indirectly affected the content of petitioner's publications." FTC Brief in Opposition at p. 11.

The FTC's assertion that the First Amendment protects only publication itself and the content of publications is simply wrong. The First Amendment protects "the free publication *and dissemination* of books," *Smith* v. *California*, 361 U. S. 147, 150 (1959) (emphasis added); freedom of speech and the press

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(Footnote continued from preceding page.)

Brief in Opposition at p. 12, is wholly unsupportable. As noted above, in the decision below the Seventh Circuit deals with the standard of judicial review only once, adopting the "wide latitude" standard at the outset of its opinion and then proceeding to apply that standard to all aspects of the case. In *Porter & Dietsch, Inc., supra*, the Seventh Circuit explicitly adopts, immediately prior to and in relation to its review of the First Amendment claims, the "wide latitude" standard of review rejected by the Third Circuit in *Beneficial Corp.* See 605 F. 2d at 304.

"includes . . . *the right to distribute,*" *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965) (emphasis added). And "it is of course no matter that the dissemination takes place under commercial auspices." *Smith* v. *California, supra,* at p. 150. See Britannica Petition at pp. 24-25.

Ignoring those cases altogether, the FTC cites *Associated Press* v. *United States,* 326 U. S. 1 (1945), in which this Court held that the First Amendment gives newspaper publishers no general immunity from the anti-trust laws. Britannica seeks no similar immunity from any laws of general applicability. Rather, Britannica asserts that the First Amendment is fully and directly applicable to a specific severe governmental restraint on Britannica's distribution of its publication—a restraint which will inhibit and may prevent such distribution altogether in many cases. See Britannica Petition at pp. 4-5, 7-8.

The FTC also cites *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U. S. 376 (1973), in which this Court upheld an ordinance prohibiting newspaper classification of employment advertisements by sex. In *Pittsburgh Press,* however, this Court went out of its way to note explicitly that the publisher did not argue that the ordinance "impairs in any signficant way its ability to publish and distribute its newspaper." 413 U. S. at 383. Here, in contrast, it is precisely Britannica's ability to publish and distribute its publications which is at issue.

In failing to subject this order to the tests applicable under the First Amendment—tests by which the order is patently indefensible (see Britannica Petition at pp. 25-26)—the judgment below is in direct conflict with the decisions of this Court.

CONCLUSION.

For the reasons set forth above and in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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